UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CRAIG S. HOLT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-216-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from diabetes mellitus and borderline intellectual functioning, is capable of performing nearly the full range of light work. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 18, 1998, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since December 31, 1992, Finding 1, Record p. 21; that he suffered from (i) borderline intellectual functioning and (ii) insulin-dependent diabetes mellitus, poorly to erratically controlled, of approximately four years' duration, Finding 3, Record p. 21; that the plaintiff did not suffer from an impairment or combination of impairments that met or equaled the criteria listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 4, Record p. 21; that in consequence of his impairments the plaintiff was limited to the performance of work activity of a light exertional level, with this capability further eroded only slightly because he could be expected to: (i) experience slight restrictions of his activities of daily living, (ii) have slight difficulties in maintaining social functioning, and (iii) seldom have deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere), Finding 7, Record pp. 21-22; that to the extent that they are inconsistent with the proposition that the plaintiff is functionally limited only as described above, the plaintiff's allegations regarding his general symptomology and the functional limitations imposed upon him by his impairments were found to be not fully credible; they were also found to be inconsistent with (i) the objective medical data of record, (ii) his described activities of living, and (iii) the statements of his treating and consulting physicians, Finding 8, Record p. 22; that the plaintiff's impairments prevented him from returning to the performance of his past semiskilled jobs as a sawmill worker, an insulation installer and a lumber handler, Finding 9, Record p. 22; that use of Rules 202.21 and 202.22 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") as a framework warranted a finding that there existed, in significant numbers in the national economy, other jobs of a light and sedentary exertional level that the plaintiff could be expected to perform, Finding 10, Record p. 22; and that, therefore, the

plaintiff was not under a disability at any time prior to the administrative law judge's decision on July 24, 1997, Finding 11, Record p. 22. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which point the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff first contends that the administrative law judge failed to consider that his borderline intellectual functioning constituted a significant nonexertional limitation, with respect to which the testimony of a vocational expert — as opposed to mechanical reliance on the Grid — was warranted. The administrative law judge, the plaintiff complains, simply referenced his mental condition in passing but made no actual finding as to its significance. The plaintiff points out that an examining psychologist, James M. Moran, Ph.D., determined that he had a full-scale IQ of 78,

placing him at "the upper limits of the Borderline classification."[2] Record p. 191. Comments by a consulting physician, Albert P. Shems, M.D., also bear out the severity of the plaintiff's intellectual deficiencies, he notes. Dr. Shems, for example, found that the plaintiff was unable to perform the basic mathematical task of multiplying 6 x 7. *Id.* at p. 185.

Use of the Grid is appropriate when a rule accurately describes an individual's capabilities and vocational profile. *Heckler v. Campbell*, 461 U.S. 458, 462 and n.5 (1983). When a claimant's impairments involve only limitations related to the exertional requirements of work, the Grid provides a "streamlined" method by which the commissioner can meet his burden of showing there is other work a claimant can perform. *Heggarty v. Sullivan*, 947 F.2d 990, 995 (1st Cir. 1991). However, in cases in which the claimant suffers from nonexertional as well as exertional impairments, the Grid may not accurately reflect the availability of other work he or she can do. *Id.* at 996; *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Whether the commissioner may rely on the Grid in these circumstances depends on whether a nonexertional impairment "significantly affects [a] claimant's ability to perform the full range of jobs" at the appropriate exertional level. *Id.* (citation and internal quotation marks omitted). If a nonexertional impairment is significant, the commissioner generally may not rely on the Grid to meet his Step 5 burden but must rely on other means, typically a vocational expert. *Id.* Even in cases in which a nonexertional impairment is determined to be significant, however, the commissioner may yet rely exclusively upon the Grid if "a non-strength impairment . . . has the effect only of reducing that

[2] The plaintiff also cited Social Security Ruling 82-55 for the proposition that his IQ fell below the range (80 or higher) that the commissioner has determined to be non-severe for purposes of a Step 2 evaluation. At oral argument, the commissioner pointed out that this ruling has been superseded by regulations on the severity of impairments, 20 C.F.R. §§ 404.1520-21, 416.920-21.

occupational base marginally[.]"[3] *Id.* This is true as well of mental impairments. *Id*. at 525-28.

In this case, the administrative law judge implicitly determined that the plaintiff's mental impairment was significant (or severe) inasmuch as he proceeded to the final *Ortiz* step of determining the degree to which the impairment eroded the Grid's occupational base. At that juncture, he concluded that the plaintiff's mental impairment only slightly eroded the occupational base for the full range of light work. He thus permissibly could rely on the Grid — at least to the extent that his conclusion concerning the degree of erosion of the occupational base was supported by substantial evidence of record. I find that it was.

Although the plaintiff in this case submitted no evidence from a treating source concerning mental impairments, the record contains several reports by consultants (at least two of whom examined the plaintiff) addressing the subject of mental disorders and their effect on his ability to function. James M. Moran, Ph.D., performed a psychological examination (including a clinical interview of the plaintiff and administration of a WAIS-R test) on the basis of which he concluded that the plaintiff's intellectual functioning fell into "the upper limits of the Borderline classification." Record pp. 188-93. Dr. Moran nonetheless discerned "no psychological impairments in his activities of daily living and no psychological impairments in his social functioning or his ability to concentrate or function in a variety of work settings."[4] *Id*. at p. 193.

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[3] The plaintiff cites two cases from other circuits, *Grant v. Schweiker*, 699 F.2d 189, 192 (4th Cir. 1983), and *Lucy v. Chater*, 113 F.3d 905, 908 (8th Cir. 1997), in support of the proposition that if a nonexertional impairment is considered significant, the testimony of a vocational expert must at all costs be obtained. Obviously, this is not the law in the First Circuit.

[4] Dr. Moran's report reveals thorough questioning of the plaintiff in regard to his work history, family background and activities of daily living as well as careful observation of the plaintiff's affect during the interview.

Scott W. Hoch, Ph.D., completed both a psychiatric review technique form ("PRTF") and a mental residual functional capacity ("RFC") assessment. *Id*. at pp. 123-35. In his PRTF, Dr. Hoch noted the presence of only one mental impairment, dysthymia, a type of affective disorder. *Id*. at p. 126. He concluded that the plaintiff suffered only "slight" restrictions of daily living and "slight" difficulties in maintaining social functioning, although he would "often" have deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. *Id*. at p. 130. In his mental RFC assessment, Dr. Hoch found the plaintiff "not significantly limited" in any area except the ability to (i) understand and remember detailed instructions, (ii) carry out detailed instructions, and (iii) interact appropriately with the general public. *Id*. at pp. 132-33. With respect to these three areas, Dr. Hoch deemed the plaintiff "moderately limited." *Id*. "[H]e is capable of performing simple one and two step jobs," Dr. Hoch concluded. *Id*. at p. 134.

David R. Houston, Ph.D., also completed a PRTF, *id*. at pp. 138-46, in which he, too, noted the presence of only one mental impairment, dysthymia, which he characterized as "mild," *id*. at p. 141. He rated the plaintiff's limitations as "slight" with regard to restriction of activities of daily living and "slight" with regard to difficulties in maintaining social functioning, predicting that he would "seldom" have deficiencies of concentration, persistence or pace. *Id*. at p. 145.

Finally — as underscored by the plaintiff on appeal — another examining consultant, Albert P. Shems, M.D., noted that the plaintiff's "mental ability is limited. He reads very poorly. He cannot spell well. He can add a few simple numbers, but he cannot add up complicated numbers. His multiplication is limited . . . ." *Id*. at p. 185. Dr. Shems concludes, however, that although the plaintiff "is limited in most work because of poor intellect and mental retardation," he "can definitely do some work." Id. at p. 186. For example, Dr. Shems suggests, the plaintiff could work in a store

at a counter, bag food and do janitorial work. *Id*.

While there are some conflicts in the evidence,[5] it paints a fairly consistent picture overall of an individual whose mental impairments impact his ability to function at work only slightly. It thus provides substantial support for the administrative law judge's finding that those impairments would only slightly erode the plaintiff's ability to perform the full range of light work in a situation (per those sections of the Grid upon which the administrative law judge relied) in which previous skills were not transferable. *See also Ortiz*, 890 F.2d at 527-28 (while use of vocational expert preferable, exclusive reliance on Grid supportable in case in which mental impairments found to cause moderate restrictions).

Turning next to the subject of his physical impairment — diabetes mellitus — the plaintiff acknowledges in his statement of errors that the record at least superficially supports a finding that his diabetic symptoms were not severe enough to rise to a level of disability. This is so, he notes, because both an examining consultant, Dr. Shems, and the plaintiff's own former treating physician, Stephen R. Barter, M.D., perceived no physiological barriers to his working. *See Record* pp. 184-86, 194-96. Both physicians, he asserts in his statement of errors, wrongly discounted his complaints of fatigue, confusion, frequent urination, tingling and cold sweats either on the ground that the reported symptoms were purely subjective or that they resulted from the plaintiff's alleged noncompliance with his treatment regime.

The plaintiff counters (i) in his statement of errors, by citing a medical treatise[6] for the

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[5] Dr. Hoch, for example, found that the plaintiff often would suffer deficiencies of concentration, persistence or pace, while Drs. Houston and Moran indicated that he seldom would.

[6] Lawrence M. Tierney, Jr., M.D., et al., *Current Medical Diagnosis & Treatment 1998* 1099, (continued...)

proposition that his subjective symptoms are consistent with those stemming from abnormal glucose readings in a diabetic, and (ii) insisting, in his statement of errors and at oral argument, that such readings have stemmed not from noncompliance but from honest difficulties (encountered primarily by his treating medical professionals) in attempting to calibrate dosages of insulin to his activities of daily living. Treatment records from The Diabetes Center, he asserts, support this claim. Moreover, he contends, Dr. Barter's opinions were given undue weight in view of their conclusory nature and the sporadic nature of his treating relationship with the plaintiff.

Social Security regulations provide that "[i]n order to get benefits, you must follow treatment prescribed by your physician if this treatment can restore your ability to work. . . . If you do not follow the prescribed treatment without a good reason, we will not find you disabled[.]" 20 C.F.R. §§ 404.1530(a)-(b), 416.930(a)-(b). *See also Tsarelka v. Secretary of Health & Human Servs.*, 842 F.2d 529, 534 (1st Cir. 1988) (claimant must follow through with securing treatment to determine what can be done to restore ability to work).

The commissioner contended at oral argument, and I agree, that there is substantial evidence of record supporting the proposition that, to the extent the plaintiff did suffer the subjective symptoms complained of, they resulted from noncompliance with his treatment regime. The evidence was uncontroverted that the plaintiff's diabetes is not well controlled. For example, the plaintiff submitted evidence showing that his blood-sugar levels bounced from abnormally high to abnormally low within the course of a day. *Id*. at pp. 33-36. The plaintiff testified, however, that these problems were not the result of willful noncompliance, noting, "I try to stay as regulated as I

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[6] (...continued)
1119, 1121-24 (37th ed. 1998).

can." *Id*. at p. 33. He also explained that he found it difficult to calibrate his exercise, eating and activities of daily living, noting, "I don't think I've ever had it really right." *Id*. at p. 35; *see also id.* at pp. 49-51.

In support thereof, the plaintiff submitted more recent medical records from The Diabetes Center (which he explained is tantamount to his new treating physician) that underscore a focus on changing his insulin mix to match his lifestyle. The commissioner contended at oral argument that because these records appeared to have been generated by nurses and dietitians, they did not constitute acceptable sources of medical opinions. Nurses and dietitians are not, as individual practitioners, acceptable sources, although "[p]ersons authorized to send [the Social Security Administration] a copy or summary of the medical records of a hospital, clinic, sanitorium, medical institution, or health care facility" are. 20 C.F.R. §§ 404.1513(a), 416.913(a). It is unclear whether The Diabetes Center records emanate from persons authorized to send them; however, even assuming *arguendo* that they do, I do not find that they undermine the substantiality of evidence supporting the commissioner's decision. Inasmuch as The Diabetes Center treatment notes indicate a dual approach of behavior modification as well as changes to the plaintiff's insulin mix, *see* Record pp. 203-07, they are not necessarily inconsistent with a finding of past compliance problems.

Turning to the other side of the scale, there is medical evidence besides that produced by Dr. Barter in support of the proposition that the plaintiff has had treatment-compliance problems. This is so noted by Henry J. Roy, III, M.D., who treated the plaintiff during an admission to Northern Cumberland Memorial Hospital in December 1993.[7] *Id*. at pp. 158-60. On the whole, while the

[7] Specifically, Dr. Roy noted: "Attempts to maintain good glucose control had been thwarted by the patient's denial, inability to adhere to a strict diabetic diet, and overall medical (continued...)

record is not devoid of evidence that the plaintiff did his best to control his diabetes, there is substantial evidence from which a finding of noncompliance without good excuse could have been made.

Finally, although the administrative law judge chose to credit Dr. Barter's report of noncompliance, he did not simply elect to give the doctor's opinions controlling weight, as posited by the plaintiff. He observed, for example, that the plaintiff's claimed symptomology appeared inconsistent not only with medical opinions and data but also with the plaintiff's described activities of daily living. *Id*. at pp. 16-17. The plaintiff testified that because his girlfriend was disabled, he shouldered nearly full responsibility for keeping house and caring for five children ages four to fifteen. *Id*. at pp. 30, 41. The administrative law judge also rejected Dr. Barter's opinions to the extent they indicated the plaintiff retained unlimited physical capacity to work, *id*. at pp. 194-95, finding instead that the plaintiff's impairments limited him to light work, *id*. at p. 19.

The record thus in its totality supports a finding, on either of two alternate grounds, that the plaintiff's diabetes mellitus was not sufficiently disabling to preclude the performance of light work: (i) that the plaintiff's symptomology resulted from noncompliance, or (ii) that the symptomology was not as disabling as claimed in view not only of the medical evidence of record but also of the plaintiff's activities of daily living.

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

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[7] (...continued)
noncompliance." Record p. 160.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 23rd day of December, 1998.

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David M. Cohen
United States Magistrate Judge